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No. 92-233

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

S.M.A. HASAN, PETITIONER

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's inability to obtain a nuclear engineering job was a result of prohibited discrimination under Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851.

PARTIES TO THE PROCEEDING

In addition to the captioned parties, Nuclear Power Services, Inc., Stone & Webster, and Texas Utilities Electric Co. were respondents in proceedings before the Secretary of Labor. They participated as amicus curiae in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not reported, but the judgment is noted at 963 F.2d 369 (Table). The final decision and order of the Secretary of Labor (Pet. App. A3-A16) and the recommended decision and order of the administrative law judge (Pet. App. A17-A27) are not officially reported.

JURISDICTION

The judgment was entered on May 7, 1992. The petition for a writ of certiorari was filed on August 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an engineer formerly employed by Nuclear Power Services, Inc. (NPSI), a contractor at the Comanche Peak nuclear power plant operated by Texas Utilities Electric Company (TUEC). Pet. App. A3, A19. Both before and during his three-and-a-half-year tenure at Comanche Peak, petitioner, who is a Moslem, had chronic personality problems with his co-workers, attributable largely to a perceived animosity between himself and his Hindu co-workers. *Id.* at A20. Additionally, petitioner often indicated to his co-workers, in an abrasive manner, that he considered himself a superior engineer. *Id.* at A21. Although petitioner was considered a good "numbers cruncher," he had continuing disagreements with other engineers when he was required to check their calculations. Petitioner was transferred at least twice during his Comanche Peak employment. *Ibid.*

During the summer of 1985, TUEC decided to replace NPSI and two other contractors, who had been using independent sets of design criteria, with a single contractor, Stone & Webster. Pet. App. A3-A4, A19. In August 1985, TUEC management recommended that Stone & Webster hire some of the engineers who worked for the earlier contractors, "consistent with the fact that the [Stone & Webster] contract had a short completion deadline," *id.* at A19, but also recommended that Stone & Webster not hire 33 former employees, including petitioner. After interviewing petitioner, Stone & Webster decided not to hire him. *Id.* at A4, A19. Stone and Webster made job offers to 79 out of 110 engineers formerly employed on the project. *Id.* at A19. In January or February 1986, petitioner reapplied for work with Stone & Webster, but was not hired based on the company's earlier no-hire decision. *Id.* at A19, A23.

2. In February 1986, petitioner complained to the Department of Labor that his failure to obtain a job in August 1985 and February 1986 resulted from the fact that he had engaged in activities protected under Section 210(a) of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5851(a).[1] Among other things, petitioner alleged that he had raised safety concerns to TUEC management, threatened to take his concerns to the Nuclear Regulatory Commission (NRC), and actually telephoned his safety concerns to an NRC employee. Pet. App. A20. The ALJ dismissed petitioner's August 1985 charge as untimely, *id.* at A25, and rejected his remaining argument that his alleged activities caused him to be blacklisted by Stone & Webster in February 1986. *Id.* at A17-A27.

In rejecting petitioner's claim of blacklisting, the ALJ stated that petitioner had not engaged in protected activity under Section 210. Contrary to petitioner's testimony, the ALJ found that his telephone call with an NRC employee was an attempt to find a job and had nothing to do with safety. Pet. App. A22. Petitioner's disputes with co-workers were not manifestations of safety concerns, the ALJ explained, because petitioner did not pursue the

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[1] Section 210(a) prohibits discrimination against an employee who has "(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended; (2) testified or is about to testify in any such proceeding or; (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.]."

matters about which he had concerns when they arose and did not characterize them as safety complaints until long after Stone & Webster's August 1985 decision not to hire him. *Id.* at A24-A25. Similarly, the ALJ concluded that while petitioner did threaten to go to the NRC, *id.* at A22, that threat was not pursued and was therefore not protected. *Id.* at A25. The ALJ read *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029 (5th Cir. 1984), to require that petitioner's concerns and threats be communicated to the NRC in order to be protected.[2] Pet. App. A25.

The ALJ also concluded, however, that neither TUEC's recommendation nor Stone & Webster's decision not to hire petitioner "was based even in part on his prior comments or threats." Pet. App. A26. The ALJ stated that TUEC recommended that Stone & Webster not hire petitioner "solely because of his history of personality problems with co-workers, which was deemed not to be conducive to working on an assignment with a short-term completion deadline." *Id.* at A22. Moreover, the ALJ found no evidence that Stone & Webster knew any specifics about petitioner's work history, or that in either August 1985 or February 1986 it treated him differently from the many other engineers who were not offered jobs. *Id.* at A22-A23. Thus, having found "neither blacklisting nor discrimination," the ALJ recommended that the complaint be dismissed. *Id.* at A26-A27.

3. The Secretary of Labor dismissed the complaint. Pet. App. A3-A16. Noting her disagreement with *Brown & Root*, the Secretary nevertheless found it unnecessary to decide whether petitioner's

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[2] *Brown & Root* was controlling here as this case arose in the Fifth Circuit.

internal complaints and threats to go to the NRC were protected activities. *Id.* at A5-A6 n.3. Instead, the Secretary agreed with the ALJ that TUEC's no-hire recommendation was based on petitioner's "chronic 'personality' problems with co-workers," and not based "'even in part' on his safety complaints or threats to go to the NRC." *Id.* at A5. Because petitioner failed to prove discrimination, his complaint was dismissed. *Id.* at A13-A14.[3]

4. The court of appeals summarily affirmed, stating that it found "no basis for rejecting the decision by the Secretary." Pet. App. A1-A2.

ARGUMENT

Petitioner contends (Pet. 6-9) that review is warranted to resolve a conflict in the circuits over whether safety concerns must be communicated to the government to warrant protection under Section 210 of the ERA, 42 U.S.C. 5851. While we agree that the circuits are in conflict, this case does not present the issue on which the circuits disagree. Because the court of appeals' affirmance of the Secretary's factbound decision is correct and does not conflict with any decision of this Court or any other court of appeals, further review is not warranted.

1. The court of appeals correctly affirmed the Secretary's decision because substantial evidence supports the Secretary's conclusion that TUEC, NPSI, and Stone & Webster did not discriminate against

[3] The Secretary affirmed the ALJ's dismissal of petitioner's August 1985 discrimination complaint as untimely, Pet. App. A4 n.2, and also rejected petitioner's requests to enforce a purported settlement and to remand for a new hearing. *Id.* at A6-A13, A14-A16. Petitioner does not seek review of the Secretary's decision on these matters.

petitioner. See 42 U.S.C. 5851(c)(1); *Dunham* v. *Brock*, 794 F.2d 1037, 1039-1040 (5th Cir. 1986).

TUEC recommended that Stone & Webster not hire petitioner in August 1985 because he had a history of problems with co-workers and would likely be a disruption on the Stone & Webster job, which had a short completion deadline. Stone & Webster, which did not know any specifics of petitioner's work history, interviewed him after receiving the negative recommendation and, in deciding not to hire him both in August 1985 and early 1986, treated him no differently from the other former employees it decided not to hire. In those circumstances, the Secretary did not consider, and was not required to consider, whether petitioner proved that he engaged in protected activities as necessary to make out a prima facie case of discrimination. See *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 713-714 (1983); *Dunham*, 794 F.2d at 1039-1040 n.2.

Petitioner does not dispute that he had chronic personality problems with his co-workers. Instead, he states (Pet. 4) that those problems resulted from his frequently expressed safety-related design concerns at Comanche Peak and that these concerns led TUEC to recommend that Stone & Webster not hire him. That disagreement with administrative fact findings concurred in by the ALJ, the Secretary of Labor, and the court of appeals raises a factbound question that does not warrant this Court's review. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

In any event, petitioner's claim lacks merit. There is substantial evidence that the no-hire recommendation "was not based 'even in part' on his safety complaints or threats to go to the NRC." Pet. App.

A5 (quoting *id.* at A26).[4] Petitioner's problems with co-workers began even before his employment at Comanche Peak and were based mainly on animosity he perceived between himself and other engineers and his abrasive attitude toward his co-workers. *Id.* at A20-A21. There was "absolutely no evidence" that his threats and comments about going to the NRC "caused him to be sanctioned, reprimanded, warned or in any way [reined] in during the remainder of his tenure [at Comanche Peak]; indeed * * * he continued to receive raises even though his difficulty with co-workers continued unabated." *Id.* at A22.

2. Because petitioner failed to prove that his threats and internal activities led to the no-hire decisions, this case does not present the issue that has led to a conflict in the courts of appeals: whether Section 210 of the ERA protects purely internal activity. Compare *Kansas Gas & Elec. Co.* v. *Brock*, 780 F.2d 1505, 1510-1512 (10th Cir. 1985) (internal complaints are protected), cert. denied, 478 U.S. 1011 (1986); *Mackowiak* v. *University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (same), with *Brown & Root*, 747 F.2d at 1036 (purely internal complaints are not protected).[5] The court of appeals' summary

[4] Petitioner mistakenly argues (Pet. 6) that the Secretary did not consider whether his personality problems were caused by his mention of safety concerns. By agreeing with the ALJ that TUEC's no-hire recommendation was based on these problems and not even in part on any safety complaints, the Secretary determined that the problems were not related to safety complaints.

[5] See also *Jones* v. *TVA*, 948 F.2d 258, 264 (6th Cir. 1991) (employee who files internal complaint "has recourse" under ERA); *Couty* v. *Dole*, 886 F.2d 147 (8th Cir. 1989) (employee who threatened to go to NRC and raised safety concerns to his supervisors established a prima facie case of discrimination); *Consolidated Edison Co.* v. *Donovan*, 673 F.2d 61 (2d Cir. 1982)

affirmance of a decision in which the Secretary had noted disagreement with *Brown & Root* cannot fairly be read to pose the conflict that petitioner asserts. Petitioner lost in the court of appeals because he was entitled to no relief, whether or not his asserted internal activities were protected.

Moreover, it is not clear that the courts of appeals that have found protection for internal activities would find that petitioner's activities were protected. The Ninth Circuit, for example, has recognized the possibility that an employer may legitimately discharge an employee whose protest activities interfere with his job performance, see *Mackowiak*, 735 F.2d at 1164-1165, and acknowledged that certain actions taken without authority may not be protected. See *Lockert* v. *United States Dep't of Labor*, 867 F.2d 513, 518 (9th Cir. 1989) (agreeing with Secretary that an employee cannot leave his work station to pursue safety concerns without permission of his supervisor); *Mackowiak*, 735 F.2d at 1161, 1164 (employee's "red tagging" of a tool crib without authority probably is not protected). It may well be that petitioner raised his alleged safety concerns and threats in a manner that interfered with his ability to work on a project requiring close cooperation among co-workers and a short deadline for completion. Some of his activities, such as "repeatedly 'reject[ing]'" other engineers' calculations based on his use of a different set of criteria, Pet. App. A21, might also not be protected under any circuit's construction of Section 210.

Finally, we believe, as we stated in opposing review in *Kansas Gas & Elec. Co.* v. *Brock*, *supra*, that the

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(finding discrimination based on internal activities without discussing issue).

Fifth Circuit was not fully presented with the arguments for finding at least some internal activities to be protected under Section 210(a). Accordingly, the Secretary intends to ask the Fifth Circuit to overrule *Brown & Root* in a pending appeal in that circuit, *Ebasco Constructors, Inc.* v. *Martin*, No. 92-4576, in order to achieve uniform protection for whistleblowers.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The issue of coverage of internal complaints also is pending in the Third Circuit in *Passaic Valley Sewerage Commissioners* v. *Martin*, No. 92-3261.